UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/686,834	10/16/2003	Charles I. Onwulata	0190.02	8469

25295 7590 11/21/2005

USDA, ARS, OTT
5601 SUNNYSIDE AVE
RM 4-1159
BELTSVILLE, MD 20705-5131

EXAMINER	
WEIER, ANTHONY J	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 11/21/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/686,834	ONWULATA, CHARLES I.	
	Examiner	Art Unit	
	Anthony Weier	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *05 October 2005*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-16* is/are pending in the application.

4a) Of the above claim(s) *15 and 16* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-14* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Election/Restrictions

1. Applicant's election with traverse of Group I in the reply filed on 10/05/05 is acknowledged. The traversal is on the ground(s) that the inventions are sufficiently interrelated to warrant examination together and that the fields of search would be approximately coextensive. This is not found persuasive because the groups have been demonstrated as independent in the Restriction Requirement and the search field and search strategy employed for each group is not commensurate and would require significant additional work.

The requirement is still deemed proper and is therefore made FINAL.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

3. Claims 1-11 and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Singh et al ("Selected Characteristics of Extruded Blends of Milk Protein Raffinate or Nonfat Dry Milk with Corn Flour" article).

Singh et al discloses an extruded milk protein product wherein same is produced extruded at temperatures within the range set forth in the instant claims (e.g. 100 C; page 287) and wherein said product is incorporated into an expanded, snack-food type product with corn flour (pages 286, 293 and 297). Although it is noted that the instant claims call for certain other particular shear rates, pressure, and torque values wherein Singh et al is silent regarding same, due to the similarity in processing between that described in Singh et al and the instant specification, it is expected that the same product or a product falling within the scope of the instant claims (of this rejection) is attained.

4. Claims 1-13 are rejected under 35 U.S.C. 102(a) as being anticipated by Onwulata et al ("Functionality of Extrusion-Texturized Whey Proteins" article).

Onwulata et al discloses a milk protein product wherein whey protein concentrate is extruded at 300 rpm and at temperatures within the range set forth in the instant claims (e.g. 100 C) . Although it is noted that the instant claims call for certain other particular shear rates, pressure, and torque values wherein Onwulata et al is silent regarding same, due to the similarity in processing between that described in Onwulata et al and the instant specification, it is expected that the same product or a product falling within the scope of the instant claims (of this rejection) is attained.

5. Claims 1-11 and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Kuipers et al.

Kuipers et al discloses an extruded snack food product containing a food ingredient (e.g. wheat bran) along with casein. Although it is noted that the instant claims call for the shear rate pressure, and torque employed, the instant invention involves the product of such processing parameters, and, due to the similarity in processing between that described in Kuipers et al and the instant specification, it is expected that the same product or a product falling within the scope of the instant claims involving this rejection.

6. Claims 1-11 and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Morimoto et al.

Morimoto et al discloses an extruded meat analog food product containing a food ingredient (e.g. corn related; col. 3, lines 1-16) along with whey milk protein (see col. 4, lines 11-36). Although it is noted that the instant claims call for the shear rate, pressure, and torque wherein Morimoto et al is silent regarding same, the instant invention involves the product of such processing parameters, and, due to the similarity in processing between that described in Mormoto et al and the instant specification, it is expected that the same product or a product falling within the scope of the claims involving this rejection.

7. Claims 1-14 are rejected under 35 U.S.C. 102(e) as being anticipated by Walsh et al.

Walsh et al discloses an extruded food product containing a food ingredient (e.g. corn related) along with whey protein concentrate (e.g. 40%; col. 2, lines 28-54; col. 5, lines 1-12) wherein said food product is used as a meat analog or a snack food and extruded using, for example, 200 rpm and a pressure of 500 psi. Although it is noted that the instant claims call for extruding under certain other pressure and temperature values of which Walsh et al is silent, the instant invention involves the product of such processing parameters, and, due to the similarity in processing between that described in Walsh et al and the instant specification, it is expected that the same product or a product falling within the scope of the claims involving this rejection.

Claim Rejections - 35 USC § 103

8. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

9. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Onwulata et al.

The claims further call for the use of said protein extrudate in a food product. However, Onwulata et al further discloses that is known to employ such extrudates or similar extrudates in food products (see page 3781). It would have been further obvious to have incorporated same in food products as a matter of preference.

10. Claims 12 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Morimoto et al.

Morimoto et al is silent regarding the use of whey protein concentrate or any of the other forms of whey set forth in claim 12. However, any of these forms contains whey protein as called for in the instant claims, and, absent a showing of unexpected results, it would have been obvious to one having ordinary skill in the art at the time of the invention to have included any one of same as an alternative source (other than just the protein itself) as a matter of preference depending on availability, cost, etc.

Double Patenting

11. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., In re Berg, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); In re Goodman, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); In re Longi, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); In re Van Ornum, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); In re Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and In re Thorington, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

12. Claims 1-14 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-13 and 17-19 of copending Application No. 10/767979. Claims 1, 2, 6-11, and 17-19 of copending Application No. 10/767979 call for a generic protein ingredient and the instant claims all refer to a milk

protein ingredient. However, it would have been obvious to one having ordinary skill in the art at the time of the invention to have employed milk protein as the protein ingredient as a matter of preference depending on availability, cost, etc. Instant claims 1-14 are generic to claims 3-5, 12, and 13 of copending Application No. 10/767979 (which are related to milk protein components) since the instant claims broadly encompass all products containing said milk protein including those which are partially denatured, fully denatured, or a combination of both.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Monday-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Anthony Weier
Primary Examiner
Art Unit 1761

Anthony Weier
November 15, 2005

11/15/05